United States Senate
Republican Policy Committee
Jon Kyl, Chairman

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Excerpts from Judiciary Committee's Oversight Hearing on the Patriot Act

Two years ago this week, the Senate passed the USA PATRIOT Act, by a vote of 98-1, in order to ensure that the Federal Government had better tools to protect Americans from terrorist acts. Last month, the Judiciary Committee held oversight hearings on the Patriot Act. Assistant Attorney General Christopher Wray, the head of the Criminal Division at the Department of Justice, testified alongside U.S. Attorneys Patrick Fitzgerald (Illinois) and Paul McNulty (Virginia) regarding key provisions of the Patriot Act. Key excerpts from the Justice Department officials' testimony are reproduced below.[1]

On increased flexibility in obtaining warrants …

Assistant Attorney General Wray: "Before the Patriot Act, a court could only issue certain warrants — for example, those authorizing searches or the use of pen registers and trap-and-trace devices — that were enforceable within its own district. This created unnecessary delays and burdens when investigating terrorist networks, which often span a number of judicial districts; time-sensitive investigations were delayed by the need to obtain additional warrants in every district where terrorist activity was being investigated. The Patriot Act authorized courts to issue search warrants and pen register orders that are enforceable nationwide in terrorism investigations.

For example, this aided authorities investigating Sami Omar Al-Hussayen, a Ph.D. candidate in computer science in Idaho who, according to the indictment, had set up a website promoting violent jihad for an organization in another state. The judge where the case was being brought, who was most familiar with the case, approved the search warrant; this allowed agents to execute simultaneous searches in different districts, thus preserving potential evidence. Such coordination is extremely important in cases where one suspect may be able to warn others of an impending search."

[1] All excerpts are from the prepared testimony provided to the Judiciary Committee by the witnesses or from the transcript of the October 21, 2003 hearing as recorded by the Federal Document Clearing House. Emphasis, where present, has been added. Both sources are available in full through the Senate Republican Policy Committee.

Mr. McNulty: "[I]nvestigators and prosecutors in my district used a Patriot Act provision to obtain a court-ordered search warrant from a single United States District Court in a complex multi-state financial investigation of terrorists' financial networks. This provision greatly expedited the investigation and saved precious time obtaining separate warrants in other districts."

On the advantages of better intelligence sharing …

Mr. Fitzgerald: "When I hear — as I do almost daily — from opponents of the Patriot Act that the law was passed in haste and ought simply be repealed, I think back to the days when we required prosecutors and agents to make decisions about national security — life and death — while only looking at half the cards in their hand and know that the change came a decade too late, not a moment too soon.

Prior to the Patriot Act, there was also concern with the prosecutor's uncertain ability to share grand jury testimony affecting national security with the intelligence community. [For example], in 1997, Wadih el Hage, a key member of the al Qaeda cell in Nairobi, Kenya, was of important intelligence interest to the United States. He thereafter departed Kenya en route to Dallas, Texas, in September 1997, changing flights in New York City. At that point, el Hage was subpoenaed from the airport to a federal grand jury in Manhattan where he was questioned about Bin Laden, al Qaeda and his associates in Kenya, including among others his close associate 'Harun.' El Hage chose to lie repeatedly to the grand jury, but even in his lies he provided some information of potential use to the intelligence community — including potential leads as to the location of his confederate Harun and the location of Harun's files in Kenya. Unfortunately, as el Hage left the grand jury room, we knew that we could not then prove el Hage's lies in court. And we also knew that we would not be permitted to share the grand jury information with the intelligence community. We could not, however, responsibly withhold information of intelligence value. Fortunately, we found a way to address the problem that in most other cases would not work. Upon request, el Hage voluntarily agreed to be debriefed by an FBI agent outside of the grand jury when it was explained that the FBI agent was not allowed in the grand jury but was also interested in what el Hage wanted to say. El Hage then repeated the essence of what he told the grand jury to the FBI agent, including his purported leads on the location of Harun and his files. The FBI then lawfully shared that information with the intelligence community. In essence, we solved the problem only by obtaining the consent of a since convicted terrorist. We do not want to have to rely on the consent of al Qaeda terrorists to address the gaps in our national security.

In August 1998, the American Embassy was bombed in Nairobi, Kenya. Investigation in Kenya quickly determined that Harun (who had left the country after the search of el Hage's home in 1997, correctly fearing that American officials were looking for him and returned much later) was responsible for the bombing. Harun's missing files were uncovered in the investigation, stored at a charity office in Nairobi. (Harun is a fugitive today and an important al Qaeda operative.) The point here is that, had el Hage provided truthful information about the al Qaeda cell in Kenya a year before the embassy attacks,

we would not have been permitted to share that grand jury material had the team not used the FBI interview to work around the problem.

This example should not be written off as 'no harm, no foul': we should not have to wait for people to die with no explanation than that interpretations of the law blocked the sharing of specific information that provably would have saved those lives before acting. The Patriot Act addressed that problem of separating the dots from those charged with connecting them.

These concrete examples demonstrate that the need to tear down — and keep down — the wall between criminal and intelligence investigations was real and compelling and not abstract."

On the Act's provision for judicially-approved roving wiretaps …

Assistant Attorney General Wray: "Terrorists, like drug dealers and other organized criminals, have employed modern technology to conduct and conceal their activities. They are now trained to thwart surveillance by rapidly changing cell phones. The Patriot Act simply leveled the playing field by allowing terrorism investigators to adapt to these methods. Section 216 clarified that the authority to use pen registers and trap-and-trace devices — long used for performing surveillance on phones — may be sought from a court for Internet communications. 'Roving' wiretaps, when approved by a court, allow investigators to conduct electronic surveillance on a particular suspect, rather than a particular telephone. This technique has been used for over a decade to investigate ordinary crimes, including drug offenses and racketeering; thanks to the Patriot Act, terrorism investigators now have the same valuable tool. * * * [T]he people who are the subject of those sorts of investigative tools are people who by definition are those with whom we've had the most trouble tracking and intercepting."

Mr. McNulty: "In an age when criminals are using pre-paid, almost disposable cellular telephones, we must constantly adapt to new technologies and the uses to which criminals put them. Under the Patriot Act, for example, prosecutors may now use a 'roving wiretap' to track a terrorist's communications even when he uses different phones to avoid detection. These roving wiretaps have been used to track suspected drug dealers for nearly 20 years. We can now use them to fight the war on terror as we have for years in the war on drugs."

On delayed notification search warrants …

Assistant Attorney General Wray: "Another important tool has been the court-approved delayed notice search warrant. This warrant allows investigators, with court approval, to delay notifying the target of a search for a limited time while the warrant is executed. *Authority to delay notice can be used only upon the issuance of a court order in narrow circumstances, such as when delay is necessary to protect witnesses and cooperators, to avoid the disclosure of undercover operations, or to prevent the removal or destruction of evidence.* This is a valuable tool, the use of which has long been upheld by courts nationwide in investigations of organized crime, drug offenses, and child pornography.

The Patriot Act simply codified the case law in this area to provide certainty and nationwide consistency in terrorism and other criminal investigations.

For example, in a recent narco-terrorism case, a court issued a delayed notice warrant to search an envelope that had been mailed to the target of an investigation. The warrant allowed officials to continue the investigation without compromising an ongoing wiretap. The search confirmed that the target was funneling money to an affiliate of the Islamic Jihad terrorist organization in the Middle East. The target of the warrant was then charged and notified of the warrant. Similar warrants were also used in the investigation of a charity suspected of illegally channeling money abroad. Authority to delay notice can be used only upon the issuance of a court order in narrow circumstances, such as when delay is necessary to protect cooperators and witnesses, to avoid the disclosure of undercover operations, or to prevent the removal or destruction of evidence."

Mr. McNulty: "Court-authorized delayed notification warrants have been used for years. … The Patriot Act merely established a uniform statutory standard applicable throughout the United States. My office has used this authority in terrorism investigations.

For example, the court authorized a delayed notice search of a business in Virginia. Surreptitious entry permitted law enforcement agents to copy numerous records (without removing them) related to the offenses under investigation. Pursuant to the Court Order, a copy of the warrant was not left on the premises of the business at the conclusion of the search. Had the court not permitted a delay of the notice, the investigation, as well as the safety of cooperating witnesses, would have been seriously jeopardized. As a result, purchases of illegal drugs had been made from targets, and a cooperating source working with law enforcement had delivered money used for the purchase of drugs to the owner of the business for subsequent transfer to targets of the investigation overseas. The cooperating source subsequently met with overseas sources to discuss future drug transactions, which could provide funding for terrorist organizations. The attorney for the operator of the business was subsequently notified of the search."

Assistant Attorney General Wray: "Anything that weakens the Patriot Act will seriously undermine our ability to prevent future acts of terrorism. One troubling proposal to do so is the Otter Amendment, recently passed by the House, which seeks to impair our use of delayed notice warrants. Under that amendment, terrorists may learn of our investigations before we can learn enough to identify and disrupt their plots. Premature notification of a search warrant can result in the intimidation of witnesses, physical injury — even death — destruction of evidence, and flight from prosecution. … I strongly oppose this and any other measure that will hamstring our front-line agents and prosecutors in the war on terrorism."

Chairman Hatch intends to convene additional Patriot Act oversight hearings in the near future.